RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,

Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

RULE 29.6 STATEMENT

The parent corporations of Kindred Nursing Centers Limited Partnership are Kindred Nursing Centers East, LLC and Kindred Hospital Limited Partnership. The parent corporation of Kindred Nursing Centers East, LLC is Kindred Healthcare Operating, Inc.; and the parent corporations of Kindred Hospital Limited Partnership are Kindred Hospital West, LLC and Kindred Nursing Centers Limited Partnership. The parent corporation of Kindred Healthcare Operating, Inc. is Kindred Healthcare, Inc.

Kindred Healthcare, Inc. is a publicly traded corporation with no parent corporation. No publicly traded company owns 10% or more of the stock of Kindred Healthcare, Inc.

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OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (Pet. App. 3a-118a) is reported at 478 S.W.3d 306. The order of the Supreme Court of Kentucky denying rehearing (Pet. App. 1a-2a) is unreported.

The following orders in *Clark* are all unreported: (1) the order of the Kentucky Court of Appeals denying interlocutory relief (Pet. App. 119a-125a); (2) the November 15, 2012 order of the Circuit Court denying the motion to dismiss and compel arbitration (Pet. App. 126a-127a); and (3) the January 9, 2012 order of the Clark County Circuit Court granting dismissal and compelling arbitration (Pet. App. 128a-130a).

The following orders in *Wellner* are all unreported: (1) the order of the Kentucky Court of Appeals denying interlocutory relief (Pet. App. 131a-137a); (2) the November 19, 2012 order of the Circuit Court denying the motion to dismiss and compel arbitration (Pet. App. 138a-139a); and (3) the January 9, 2012 order of the Clark County Circuit Court granting dismissal and compelling arbitration (Pet. App. 140a-142a).

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on September 24, 2015. Pet. App. 3a. That court denied rehearing on February 18, 2016. Pet. App. 1a-2a. On May 9, 2016, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including July 1, 2016. The petition for a writ of certiorari was filed on July 1, 2016 and

granted on October 28, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This Court has repeatedly held that the FAA "preclude[s] States from singling out arbitration provisions for suspect status." *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see also *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-69 (2015); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S.

333, 339 (2011); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

Yet the Kentucky Supreme Court, by a divided vote, did just that, refusing to enforce two arbitration agreements entered into by individuals who had been given express authority to accept "contracts" on behalf of their principals. Specifically, the court held that a power of attorney broadly authorizing an attorney-in-fact to enter into contracts extends to any kind of contract ***except*** a dispute-resolution agreement. An explicit reference to arbitration in a power-of-attorney document is required to authorize an attorney-in-fact to enter into an arbitration contract, the court said, because (in the court's view) such an agreement waives the principal's "sacred," "inviolate," and "God-given" right to a jury trial.

That anti-arbitration approach cannot be squared with this Court's precedents, which hold that Section 2 of the FAA preempts state-law rules that are "restricted to [the] field" of arbitration and do not "place[] arbitration contracts on equal footing with all other contracts." *Imburgia*, 136 S. Ct. at 468-69 (quotation marks omitted); see also *Concepcion*, 563 U.S. at 339; *Casarotto*, 517 U.S. at 687; *Perry*, 482 U.S. at 492 n.9.

Indeed, by tying its requirement of express reference to arbitration contracts to the waiver of a jury trial—the absence of which is a key defining characteristic of an arbitration proceeding—the majority below applied a rationale that, if permitted to stand, would open the door to numerous state-law rules erecting obstacles to the enforcement of arbitration agreements. As one of the dissenting Justices below put it, the Kentucky Supreme Court's decision makes a "clever contribution to th[e] new genre" of state-

court decisions seeking to evade this Court's precedents interpreting the FAA. Pet. App. 99a (Abramson, J., dissenting).

The Kentucky court's ruling defies three decades of this Court's settled precedent by imposing improper obstacles to the enforcement of arbitration agreements. The Court should reverse the decision below.

A. Factual Background.

Petitioners Kindred Nursing Centers Limited Partnership, *et al.* (collectively "Kindred") operate nursing homes and rehabilitation centers, including the Winchester Centre for Health and Rehabilitation (a/k/a Fountain Circle Health and Rehabilitation). Pet. App. 6a. Respondents Janis Clark and Beverly Wellner represent, respectively, the estates of Olive Clark and Joe Paul Wellner, two now-deceased residents of the Winchester Centre.[1]

Before the residents were admitted to the Winchester Centre, they had executed powers of attorney designating respondents Clark and Wellner, respectively, as their attorneys-in-fact. These powers of attorney conferred broad authority upon the attorneys-in-fact to enter into transactions and agreements relating to their principals' affairs.

Janis Clark's power of attorney, in pertinent part, conferred the power "[t]o draw, *make*, and sign in my name *any and all* checks, promissory notes, *contracts*, deeds or *agreements*; * * * and Generally to do and perform for me and in my name all that I might do if present." J.A. 7-8 (emphases added). Bev-

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[1] Janis Clark is the daughter of Olive Clark, and Beverly Wellner is the wife of Joe Wellner. See Pet. App. 16a, 20a.

erly Wellner's power of attorney authorized her to "*make, execute and deliver* deeds, releases, conveyances and *contracts of every nature* in relation to both real and *personal property*." J.A. 10-11 (emphases added).

When their respective principals were admitted to the Winchester Centre, respondents signed the admission paperwork on their principals' behalf. Pet. App. 6a-7a. Each also executed a separate agreement titled "Alternative Dispute Resolution Agreement Between Resident and Facility (Optional)." *Id.* at 17a; J.A. 14-27. This arbitration agreement provided that any disputes arising out of the "[r]esident's stay at the Facility" would be resolved in arbitration. J.A. 14, 21. It also explained that "execution of this [arbitration] Agreement is not a precondition to the furnishing of services to the Resident by the Facility." J.A. 19, 26.

B. Proceedings Below.

Respondents brought suit against petitioners, alleging state statutory and common-law claims arising out of their principals' deaths while residing at the Winchester Centre. Each respondent asserted causes of action for wrongful death, personal injury, and violations of Ky. Rev. Stat. § 216.510 *et seq.*, which enumerates certain rights of long-term care residents.[2] Pet. App. 17a, 20a. In each case, petition-

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[2] Under Kentucky law, the wrongful death claims belong to the respondents themselves, not their principals. See Pet. App. 8a-12a. Because respondents themselves did not agree to arbitration, the arbitrability of those wrongful death claims was not challenged in the Kentucky Supreme Court (Pet. App. 100a (Noble, J., dissenting)); nor is it at issue here. This case involves

ers moved to dismiss or stay the lawsuits, seeking to enforce the arbitration agreements between petitioners and the residents. *Id.* at 17a, 21a.

1. The state trial court initially dismissed each lawsuit in favor of arbitration. Pet. App. 18a, 21a. Subsequently, the Supreme Court of Kentucky held in *Ping* v. *Beverly Enterprises, Inc.*, 376 S.W.3d 581, 592-94 (Ky. 2012), that broad language in a power of attorney authorizing the attorney-in-fact to perform "every act and thing whatsoever requisite and necessary to be done" was limited by the specific authorizations to manage the principal's "financial affairs" and "health-care decisions," and did not include the authority to bind the principal to an optional arbitration agreement.[3]

Respondents moved for reconsideration of the dismissal orders. In each case, the trial court granted reconsideration and reversed its prior ruling, holding that the arbitration agreements were unenforceable because respondents lacked authority to bind their principals to arbitration. *Id.* at 18a, 21a.

2. Petitioners sought interlocutory review of both decisions in the Kentucky Court of Appeals. That court denied relief in both cases, holding that under *Ping*, respondents lacked authority under their pow-

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the arbitrability of the remaining claims, which respondents are asserting on behalf of their deceased principals' estates.

[3] *Ping* did not have occasion to consider whether the powers of attorney at issue here—including documents that conferred express authority to make contracts—include the authority to enter into an arbitration agreement. As we discuss in more below (at 21-22), the decision in *Ping* thus provided no basis for the explicit-reference rule announced by the Kentucky Supreme Court here.

ers of attorney to bind their principals to arbitration. Pet. App. 19a-21a.

Petitioners then applied to the Supreme Court of Kentucky for interlocutory relief. *Id.* at 19a-20a, 23a. The state supreme court consolidated the two cases with a third case presenting similar issues, but involving a nursing home and rehabilitation facility that is not one of the petitioners.

3. A divided Supreme Court of Kentucky affirmed the Court of Appeals' orders denying interlocutory relief to compel arbitration, by a 4-3 vote.

The majority first considered whether the text of the powers of attorney at issue appeared to authorize the attorneys-in-fact to enter into arbitration agreements on their principals' behalf. It held that the power of attorney in *Wellner* did not provide the requisite authorization. Although the *Wellner* power of attorney authorized the attorney-in-fact to make "contracts" related to "personal property," and although the majority acknowledged that legal claims are a form of personal property, the majority concluded that an arbitration agreement does not "relate" to personal property, but rather solely to the principal's "constitutional right to access the courts and to trial by jury." Pet. App. 37a.

The majority held that the *Clark* power of attorney, by contrast, *did* convey the necessary authority, concluding that in light of its broad language, "it would be impossible to say that entering into a predispute arbitration agreement was not covered." *Id.* at 39a.

The majority then proceeded to consider, in *Clark* "as well as the other cases," the "extent to which the authority of an agent to waive his princi-

pal's fundamental constitutional rights to access the courts, to trial by jury, and to appeal to a higher court, can be inferred from a less-than-explicit grant of authority." Pet. App. 40a. It held that only a grant of authority to enter into arbitration agreements explicitly "expressed in the text of the power-of-attorney document" is sufficient to authorize an attorney-in-fact to agree to arbitration. *Id.* at 41a.

The majority opined that it would be "strange" to conclude that a general power of attorney authorized an attorney-in-fact to "waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude." Pet. App. 42a. Equating agreements to resolve disputes by arbitration with the relinquishment of fundamental rights such as freedom from slavery, familial and reproductive rights, and religious freedom, the majority held that courts may not infer from a general power of attorney the authority to waive a principal's right to a jury trial. *Id.* at 43a.

The majority went on to say that the drafters of the Kentucky Constitution had "deemed the right to a jury trial to be *inviolate*, a right that cannot be taken away; and, indeed, a right that is *sacred*, thus denoting *that right and that right alone* as a divine God-given right." Pet. App. 43a (last emphasis added). Based on this assessment of the status of the right to a jury trial, the majority concluded that an express grant of authority is needed before an attorney-in-fact can enter into an arbitration agreement on behalf of her principal.

The majority then "reject[ed] the notion" that its decision conflicted with the FAA or this Court's precedents. For example, it described *Concepcion* as holding only that state law is preempted only when it "prohibits outright the arbitration of a particular type of claim," and stated that its ruling did not run afoul of that prohibition because arbitration agreements between nursing homes and residents could still be enforced as long as they were signed by the resident or an attorney-in-fact with explicit authority to enter into arbitration agreements. Pet. App. 46a (quotation marks omitted). And the majority denied that its decision was "hostile" to arbitration, stating that its new rule "merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relinquishment of fundamental constitutional rights." *Id.* at 47a-48a.

Chief Justice Minton and Justices Abramson and Noble dissented, with Justices Abramson and Noble each authoring a dissenting opinion.

The principal dissent, written by Justice Abramson and joined by the other two dissenting justices, explained that under the "clear precedent" of this Court, the majority was "not at liberty to conclude that in Kentucky a power of attorney that gives the agent express authority to contract does not include the authority to contract for arbitration * * *." Pet. App. 78a (Abramson, J., dissenting). Rather, "[w]hether one sympathizes with the majority's dislike of federally imposed arbitration or not, the inescapable fact remains that the majority has disregarded controlling law" under the FAA and that the arbitration agreements must be enforced. *Id.* at 99a. The dissent concluded that the majority's holding "fl[ies] in the face of federal law and [is] preempted

by the Supremacy Clause because it [is] clearly not * * * a state-law principle applicable to 'any contract' but rather one that singles out arbitration agreements for disfavored treatment." *Id.* at 78a.[4]

SUMMARY OF ARGUMENT

The decision below stands in stark defiance of this Court's repeated holdings that the FAA preempts state-law rules that disfavor arbitration agreements. By requiring that a power of attorney contain an explicit statement authorizing the attorney-in-fact to enter into an arbitration agreement—even though Kentucky law does not impose that requirement as to a power of attorney to enter into other types of contracts—the Kentucky court flatly violated the FAA's mandate that courts must "place[] arbitration agreements on equal footing with all other contracts." *Imburgia*, 136 S. Ct. at 468; see also *Casarotto*, 517 U.S. at 686-87; *Perry*, 482 U.S. at 492 n.9.

The Kentucky court sought to avoid FAA preemption by describing its rule as one of general applicability. Specifically, it claimed both that its rule is an application of general agency law and that Kentucky would require express authority before an attorney-in-fact could waive *any* constitutional right of the principal.

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[4] Justice Noble "join[ed] Justice Abramson's dissent for its reasoning on the main points in these cases," but separately dissented "to begin correcting any confusion about agency law by the part of our *Ping* decision that was actually not determinative in the result of the case." Pet. App. 116a. Unless otherwise noted, references to the "dissent" refer to Justice Abramson's dissenting opinion.

But these justifications are squarely precluded by this Court's precedents. *First*, there is no general principle of Kentucky agency law (or any jurisdiction's agency law, for that matter) that would support the illogical conclusion that the authority to enter into "contracts" delegates the power to enter into any contract *except* a dispute-resolution agreement. Accordingly, the state court's interpretation is like the one declared preempted in *Imburgia*, in which this Court explained that "nothing in the [state court's] reasoning suggest[ed]" that a court in that State "would reach the same interpretation * * * in any context other than arbitration." 136 S. Ct. at 469.

Second, the *only* constitutional rights to which the court's reasoning applies are the rights to a jury trial and access to courts—the waiver of which, not by happenstance, are the most defining characteristics of an arbitration agreement. The court's explicit-authorization rule does not apply, for example, even to other constitutional rights that are relevant to contracting—such as Kentucky's constitutional right "of acquiring and protecting property." Ky. Const. § 1; see also Pet. App. 93a (Abramson, J., dissenting). Nor does it apply to forum-selection clauses that select a forum in which a party would not otherwise be subject to personal jurisdiction—even though such a choice of forum waives that party's due process rights. Thus, the Kentucky court's rule is a contract defense that specifically targets arbitration agreements and is accordingly preempted by the FAA.

Indeed, if the decision below were affirmed, States would have virtual carte blanche authority to impose discriminatory barriers to the enforcement of arbitration agreements. For example, the Montana statute rejected in *Casarotto*—requiring notice of an

arbitration provision to be highlighted and capitalized on the first page of a contract—could be resurrected by simply recharacterizing it as a rule that special notice is required for any contract waiving the rights to a jury trial and access to courts. Along those lines, States would be free to conjure up new hurdles to arbitration agreements, such as requiring that any waiver of a jury trial be signed in triplicate form to be effective. And a State could outlaw predispute arbitration agreements entirely by adopting the rule that, as a matter of state law, advance waivers of the right to a jury and other constitutional rights are invalid.

At the end of the day, the decision below is yet another in a long line of state court decisions seeking to evade the FAA's prohibition against discriminatory burdens on the enforcement of arbitration agreements. See, *e.g.*, *Imburgia*, 136 S. Ct. 463; *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam); *Marmet Health Care Center, Inc.* v. *Brown*, 132 S. Ct. 1201 (2012) (per curiam). As Justice Abramson observed in dissent, the decision makes "a clever contribution to this new genre" of recent cases that have attempted "to 'rule around' the FAA." Pet. App. 99a (Abramson, J., dissenting). Such end-runs improperly flout this Court's precedents. The Kentucky court's decision accordingly should be reversed.

ARGUMENT

I. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

The Kentucky Supreme Court's rule requiring powers of attorney to contain specific language that expressly authorizes attorneys-in-fact to enter into

arbitration agreements cannot be squared with the FAA's mandates.

A. This Court Has Repeatedly Held That State-Law Rules That Disfavor Arbitration Are Preempted By The FAA.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted); see also *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 668 (2012) (the FAA was "enacted in 1925 as a response to judicial hostility to arbitration") (citing *Concepcion*, 563 U.S. at 339); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) (explaining that the FAA "seeks broadly to overcome judicial hostility to arbitration agreements").

Section 2 of the FAA therefore commands that "[a]n agreement to arbitrate is valid, irrevocable, and *enforceable as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry*, 482 U.S. at 492 n.9 (quoting 9 U.S.C. § 2). "Section 2 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner." *Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008) (quoting *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984)).

"By enacting § 2, * * * Congress precluded States from singling out arbitration provisions for suspect status" (*Casarotto*, 517 U.S. at 687) or from invalidating arbitration provisions through state-law rules that "apply only to arbitration or that derive their

meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339; see also *Imburgia*, 136 S. Ct. at 469 (FAA preempts state-law interpretation of a contract that is "restricted to th[e] field" of arbitration); *Perry*, 482 U.S. at 492 n.9 ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with * * * § 2."). Nor may States apply generally applicable state-law doctrines "in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341.

The FAA also precludes reliance on "judicial policy concern[s] as a source of authority" for refusing to enforce arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009); see also *Concepcion*, 563 U.S. at 342 (explaining that the FAA was enacted to eliminate the "'great variety' of 'devices and formulas' declaring arbitration against public policy"). Thus, it is immaterial that the discriminatory rule here derives from common law rather than a statute; the FAA preempts any "state law, whether of legislative *or judicial* origin," that disfavors arbitration. *Perry*, 482 U.S. at 492 n.9 (emphasis added); see *Casarotto*, 517 U.S. at 687 n.3.

Based on these well-established principles, this Court repeatedly has overturned decisions by state courts when, as here, they either have ignored or refused to apply the FAA and this Court's precedents interpreting it. As the Court has explained, because "[s]tate courts rather than federal courts are most frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 133 S. Ct. at 501.

Just last Term, this Court reversed a decision of the California Court of Appeal that had adopted a dubious interpretation of an arbitration agreement in the course of declaring the agreement unenforceable. *Imburgia*, 136 S. Ct. at 468-71. This Court concluded that the California courts would not have reached the same interpretation of the contract "in any other context other than arbitration"; instead, the California court's analysis was "restricted to that field"—precisely the kind of state-law discrimination against arbitration that the FAA flatly forbids. *Id.* at 469. And the Court underscored that "[t]he Federal Arbitration Act is a law of the United States," and, "[c]onsequently, the judges of every State must follow it." *Id.* at 468.

Two decades ago, in *Casarotto*, the Court reached the very same conclusion, holding that "threshold limitations placed specifically and solely on arbitration provisions" are unenforceable because they are "antithetical to" the "'goals and policies' of the FAA to promote arbitration by treating arbitration as favorably as any other contract." 517 U.S. at 688. Thus, the FAA preempted a Montana statute requiring special notice of an arbitration provision on the first page of a contract, because the statute "singl[ed] out arbitration provisions for suspect status." *Id.* at 687.

The Court refused to excuse this special notice requirement as a particular application of a general state policy that purportedly unexpected contract terms must be conspicuous, and instead reiterated that "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what * * *

the state legislature cannot.'" *Casarotto*, 517 U.S. at 687 n.3 (quoting *Perry*, 482 U.S. at 492 n.9).

Similarly, the Court has recognized that the FAA preempts and forbids enforcement of state-law rules categorically "prohibiting arbitration of a particular type of claim," because such state-law bars are "contrary to the terms of and coverage of the FAA." *Marmet*, 132 S. Ct. at 1204. In *Marmet*, this Court vacated and remanded a decision of "the Supreme Court of Appeals of West Virginia," which had declared "unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes." 132 S. Ct. at 1202. "[B]y misreading and disregarding the precedents of this Court interpreting the FAA," the West Virginia court "did not follow controlling federal law implementing th[e] basic principle" that both "[s]tate and federal courts must enforce the Federal Arbitration Act." *Ibid.*; see also *id.* at 1203 ("The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.").

Moreover, *Casarotto* and *Marmet* are far from alone: On several other occasions, this Court has declared state law preempted when it runs afoul of the FAA. See *e.g.*, *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (FAA preempted state law requiring judicial resolution of claims involving punitive damages); *Perry*, 482 U.S. at 489-491 (FAA preempted state law requiring that litigants be provided a judicial forum for wage disputes); *Southland*, 465 U.S. at 10 ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of

claims which the contracting parties agreed to resolve by arbitration," including for claims brought under state franchise-investment law); cf. *Preston*, 552 U.S. at 358-59 (FAA preempted state law requiring claims under California's Talent Agents Act to be submitted to the Labor Commissioner in the first instance, rather than to arbitration (or litigation)).

In sum, the Court has not hesitated to strike down the sweeping panoply of rules and devices that States—including state supreme courts—have crafted to evade the FAA. As we next explain, this Court should reach the same conclusion here.

B. The Kentucky Court's Explicit-Reference Rule Singles Out Arbitration For Suspect Status.

The Kentucky Supreme Court's decision in this case similarly failed to adhere to the FAA and this Court's precedents interpreting that statute.

In both of the individual cases consolidated before the Kentucky court (*Clark* and *Wellner*), an attorney-in-fact for the resident had been granted authority to enter into "contracts" on the resident's behalf. Pet. App. 19a, 22a. The majority below nonetheless held that those attorneys-in-fact could not enter into arbitration agreements—even though they did have the power to enter into *other* kinds of contracts—because the power of attorney did not specifically mention arbitration agreements. This explicit-reference rule clearly "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity." *Casarotto*, 517 U.S. at 688.

Indeed, it is hard to imagine a more fundamental precept under the FAA than this Court's repeated admonition that arbitration provisions must "be

placed 'upon the same footing as other contracts.'" *Id.* at 687 (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Accord, *e.g.*, *Imburgia*, 136 S. Ct. at 468; *Concepcion*, 563 U.S. at 339; *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); *Allied-Bruce*, 513 U.S. at 271; *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Perry*, 482 U.S. at 482 n.9; *Southland*, 465 U.S. at 16 & n.11.

The parallels to *Casarotto* are striking. The Montana statute struck down in that case required contracts with arbitration clauses to provide notice of the clauses in underlined capital letters on the first page of the contract. The Court held that this heightened-notice requirement "directly conflict[ed] with § 2 of the FAA because the State's law condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." 517 U.S. at 687.

The Kentucky Supreme Court's rule similarly conditions the enforceability of arbitration agreements signed by attorneys-in-fact on an explicit-reference requirement that is not applicable to other kinds of contracts. See also Pet. App. 78a (Abramson, J., dissenting) (noting that the majority's rule requiring an explicit mention of arbitration "singles out arbitration agreements for disfavored treatment in the same vein as the statutes and judicially-created rules" that this Court has previously held preempted by the FAA).

To sustain the decision below would thus require the Court to over more than three decades of prece-

dent. Yet "[o]verruling precedent is never a small matter," and *stare decisis*—"a foundation stone of the rule of law"—"carries enhanced force when a decision * * * interprets a statute" such as the FAA; when "Congress has spurned multiple opportunities to reverse" this Court's precedents if it so chose; and in "cases involving property and contract rights," "because parties are especially likely to rely on such precedents when ordering their affairs." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-10 (2015) (quotation marks omitted).

The majority below offered two principal reasons for excusing its explicit-reference rule's discriminatory treatment of arbitration: (1) it deemed the rule to be both a general application of Kentucky agency law and a construction of powers of attorney in general; and (2) it asserted that the explicit-reference rule applies to the waiver of all fundamental constitutional rights. Neither explanation for the state-law rule saves the holding below from preemption.

1. The Explicit-Reference Rule Is Not Applicable To Contracts Generally.

Like the court below here, the plaintiffs in *Imburgia* pointed to the California Court of Appeal's purportedly neutral interpretation of the phrase "law of your state" in a consumer contract. This Court recognized, of course, that "California courts are the ultimate authority on [California] law." *Imburgia*, 136 S. Ct. at 468. Nonetheless, it was for this Court to "decide whether the decision of the California court places arbitration contracts "'on equal footing with all other contracts.'" *Ibid.* (quoting *Buckeye*, 546 U.S. at 443).

In other words, to assess whether the FAA's dictates have been honored, the Court must determine whether a state court would in fact "interpret contracts other than arbitration contracts the same way," rather than simply accepting the state court's professions of neutrality. *Id.* at 469; see also *ibid.* ("Since the interpretation of a contract is ordinarily a matter of state law to which we defer * * * we must decide not whether [the state court's] decision is a correct statement of California law but whether (assuming it is) that state law is consistent with the Federal Arbitration Act."); *Perry*, 482 U.S. at 492 n.9 (explaining that, as a matter of "choice-of-law," "the principles of federal common law" embodied by the FAA trump "state-law holding[s]" if those holdings "rely on the uniqueness of an agreement to arbitrate as a basis" for resisting enforcement).[5]

Applying that standard, this Court held in *Imburgia* that the FAA precluded the California Court of Appeal's interpretation of the term "law of your state" to exclude the preemptive force of federal law because "nothing in the [state court's] reasoning suggest[ed]" that a court in that state "would reach

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[5] In other contexts, such as the independent-and-adequate-state-grounds doctrine, this Court likewise is not obligated to accept at face value a state court's reasoning. In that context, the Court instead inquires whether the state procedural rule purportedly precluding federal review has been "firmly established and regularly followed." *James* v. *Kentucky*, 466 U.S. 341, 348 (1984); see also, *e.g.*, *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 369 (1990) ("A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.'"); *id.* at 369 n.16 (collecting cases).

the same interpretation of 'law of your state' in any context other than arbitration." 136 S. Ct. at 469.

That same principle controls the outcome here.

The majority below's description of its rule as an application of the "general principle[] * * * that an attorney-in-fact may not act beyond the powers he has been granted under the power-of-attorney instrument" (Pet. App. 45a) is therefore not controlling. A rule characterized as a particular application of generally-applicable contract doctrines is still preempted when that rule is "applied in a fashion that disfavors arbitration" (*Concepcion*, 563 U.S. at 341) or that is "restricted to that field" (*Imburgia*, 136 S. Ct. at 469).

And there can be no doubt that the majority's explicit-reference rule fits that description: As the dissent below explained, the rule "burdens agent-entered arbitration agreements more heavily than either agent-entered contracts generally, or judicial forms of agent-initiated dispute resolution." Pet. App. 92a (Abramson, J., dissenting). In fact, we are not aware of—nor have been able to find—*any* Kentucky decisions holding that any other types of contracts are subject to this explicit-reference rule. In other words, we have located no other decision drawing the (illogical) conclusion that the authority to enter into "contracts" really means the authority to enter into all contracts *except* one specific kind of contract.

The Kentucky Supreme Court's earlier decision in *Ping*, for example, offers no support for the explicit-reference rule. That case held that an attorney-in-fact lacked authority to enter into an optional arbitration agreement because "the only decisions specif-

ically provided for in the document" were "to make financial and health-care decisions." 376 S.W.3d at 591. The defendant had relied on general language that the attorney-in-fact had "full and complete power and authority to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done," but the court rejected the claim that this language provided "a sort of universal authority beyond th[e] express provisions." *Id.* at 590-92. Whatever the merits of that decision, it is clearly inapplicable here, as the powers of attorney in this case *explicitly* authorized the attorneys-in-fact to make or enter into contracts. See also Pet. App. 70a-72a (Abramson, J., dissenting) (distinguishing *Ping* on this basis, and collecting cases doing the same).

It is also significant that Kentucky law erects no similar barriers to allowing state-appointed guardians—as opposed to attorneys-in-fact—to enter into arbitration agreements on behalf of their wards. As a federal court in Kentucky recently explained in enforcing an arbitration agreement entered into by a guardian, "a disabled person, once appointed a guardian, is stripped of several rights—including 'the right * * * to enter into contractual relationships.'" *Preferred Care, Inc.* v. *Howell*, 2016 WL 4470746, at *3 (E.D. Ky. Aug. 19, 2016) (quoting Ky. Rev. Stat. § 387.590(10)). "So it follows that these rights, once taken from the ward, are vested in the guardian to care for him"—and this right to enter into contractual relationships generally includes the right to enter into arbitration agreements, even though the Kentucky guardianship statute does not explicitly reference arbitration. *Ibid.*; accord *Preferred Care, Inc.* v. *Bleeker*, 2016 WL 6636854, at *4 (E.D. Ky. Nov. 8, 2016) (same).

Finally, in one of the two cases consolidated before the court below, *Wellner*, the majority identified a second reason for refusing to enforce the arbitration agreement. Even though the *Wellner* power of attorney authorized the attorney-in-fact to make contracts "'*in relation to* * * * *personal property*,'" Pet. App. 22a—and the majority "certainly agree[d]" that "personal injury claim[s]" and other "'choses-in-action are personal property,'" *id.* at 36a (quoting *Button* v. *Drake*, 195 S.W.2d 66, 69 (Ky. 1946))—the majority nonetheless held the power to agree to arbitration outside the scope of the attorney-in-fact's authority. Instead, the majority said, an agreement to arbitrate the principal's legal claims somehow did not "relat[e] to" the claims, but rather solely to the principal's "constitutional right" to trial by jury, which is not "personal property." *Id.* at 37a.

This conclusion not only defies common sense, but also is preempted by the FAA, because the reasoning would not apply to any agreement other than an agreement to arbitrate. In light of Kentucky's long-standing recognition that causes of action are personal property (see *Button*, 195 S.W.2d at 69), it is unthinkable that Kentucky courts would interpret the phrase "contracts * * * in relation to * * * personal property" to exclude any other kind of agreement relating to an individual's legal claims. See Pet. App. 85a (Abramson, J., dissenting); cf. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (recognizing "that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause") (citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). In short, the decision below impermissibly discriminated against arbitration in its treatment of both the *Clark* and *Wellner* powers of attorney.

2. *The Explicit-Reference Rule Cannot Be Salvaged By The Kentucky Court's Reference To "Fundamental Constitutional Rights."*

Similarly unavailing is the majority's rationale that its explicit-reference rule does not disfavor arbitration because the rule applies to all "fundamental constitutional rights." Pet. App. 48a. That rationale falters for several reasons.

First, the majority's own reasoning does not apply to all constitutional rights, but rather singles out only those rights that are inherently affected by arbitration agreements. The majority describes the right to a jury trial as the one and only "sacred" constitutional right in Kentucky. Pet. App. 43a ("[T]he drafters of our Constitution deemed the right to a jury trial * * * *and that right alone* as a divine God-given right." (emphasis added)). There is nothing in the majority opinion to suggest that its reasoning would apply to any waiver of a constitutional right *other* than the right to a jury trial—which is "the one right that just happens to be correlative to the right to arbitrate." *Id.* at 95a (Abramson, J., dissenting) (emphasis omitted).[6]

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[6] The dissent also explained in detail that, as a matter of Kentucky law and history, the majority's elevation of the right to a jury trial to sacrosanct status is substantially overstated in civil cases like this one. Rather, "the 'sacredness' of the jury-trial guarantee had much more to do with the protection it afforded *criminal* defendants" in felony cases, not civil plaintiffs. Pet. App. 89a-90a n.26 (Abramson, J., dissenting) (emphasis added). The dissent further noted that as a matter of Kentucky practice, the right to a jury trial in civil cases is waived by default—a litigant must file a timely written notice demanding a jury trial to preserve the right—further undermining the majority's

In *Concepcion*, moreover, this Court gave as an example of a preempted state law one that would classify as unconscionable an arbitration agreement that "disallow[s] an ultimate disposition by a jury." 563 U.S. at 342. The Court thus recognized that foregoing a jury trial in favor of informal dispute resolution is an inherent feature of arbitration. As the dissent below summarized, the FAA and this Court's precedents preclude courts from "either disfavoring arbitration directly under state law, or disfavoring it indirectly by favoring its correlative opposite—a judicial trial." Pet. App. 89a (Abramson, J., dissenting).

The other rights under the Kentucky Constitution principally relied upon by the majority to justify its explicit-reference rule also fall within the category of such "rights" inherently affected by arbitration agreements. According to the majority, "[t]he need for specificity" in a power of attorney "is all the more important when the affected fundamental rights include the right of access to the courts (Ky. Const. § 14) [and] the right of appeal to a higher court (Ky. Const. § 115)." Pet. App. 41a. The absence of these judicial procedures are—like the absence of a jury trial—also inherent characteristics of arbitration.

By contrast, Kentucky's Constitution includes other protections as to which an explicit authorization is *not* required. For example, the Kentucky Constitution confers the "inherent and alienable right[] * * * of acquiring and protecting property" (Ky. Const. § 1) and guarantees that no law shall be enacted "impairing the obligation of contracts" (*id.* § 19). Yet as Justice Abramson explained, attorneys-in-fact in

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elevation of that right "to a heretofore unrecognized status." *Id.* at 98a-99a.

Kentucky "routinely exercise, compromise, and waive fundamental constitutional rights on behalf of their principals"—such as the right to acquire and dispose of property. Pet. App. 93a (Abramson, J., dissenting).

The majority's opinion likewise does not indicate that explicit authorization is necessary to confer the authority to enter into a forum selection clause—and we are aware of no other Kentucky decision so holding—even though such clauses may waive a party's constitutional due process rights by selecting a forum in which that party would otherwise not be subject to personal jurisdiction. See, *e.g.*, *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) ("[D]ue process requires" that, in order to subject a defendant to personal jurisdiction in a forum, the defendant must "have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'").

Thus, there is no evidence that generally-applicable principles of Kentucky law require powers of attorney to make explicit reference to the authority to affect or waive any of the principal's constitutional rights. That should "lead [this Court] to conclude that the [Kentucky] court's" explicit-reference rule "is unique" and "restricted to th[e] field" of arbitration. *Imburgia*, 136 S. Ct. at 469.[7]

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[7] It is also telling—and entirely consistent with this Court's precedents—that federal circuit courts have repeatedly rejected arguments that a heightened standard requiring a "knowing and voluntary" waiver of the Seventh Amendment right to a jury should apply to the enforcement of an arbitration agreement. As the Fourth Circuit put it, "[c]ommon sense dictates that we reject" the argument that a plaintiff "could not have knowingly

Second, and relatedly, the majority "ma[d]e plain the hostility to arbitration" that underlies its holding (Pet. App. 97a (Abramson, J., dissenting)) when it justified its explicit-reference rule by comparing arbitration agreements—favored under federal law—to binding the principal to "personal servitude"; terminating "the principal's parental rights"; "put[ting] her child up for adoption"; or stripping the principal of her "right to worship freely" (Pet. App. 42a).

These inflammatory and unsupportable analogies reflect precisely the type of hostility to arbitration as a means of dispute resolution that this Court has repeatedly declared out of bounds under the FAA. As the Court emphasized over three decades ago, "we are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler–*

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and voluntarily waived her Seventh Amendment rights to a jury trial" because the "'loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.'" *Snowden* v. *CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (citation omitted); see also, *e.g.*, *IFC Credit Corp.* v. *United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 994 (7th Cir. 2008) ("[A]n agreement to arbitrate * * * surrenders not only a jury trial but also the right to a judicial forum[,] [yet] [c]ourts do not impose special negotiation requirements on arbitration clauses in form contracts."); *Caley* v. *Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1370-73 (11th Cir. 2006) (explicitly rejecting a "knowing and voluntary" requirement for the waiver of jury trial rights pursuant to an arbitration agreement); *Cooper* v. *MRM Inv. Co.*, 367 F.3d 493, 506 (6th Cir. 2004) (same); *Am. Heritage Life Ins. Co.* v. *Orr*, 294 F.3d 702, 711 (5th Cir. 2002) ("[B]y agreeing to arbitration, Appellants have necessarily waived * * * their right to a judicial forum; and * * * their corresponding right to a jury trial.").

Plymouth, Inc., 473 U.S. 614, 626-27 (1985); see also, *e.g.*, *14 Penn Plaza*, 556 U.S. at 266-67 ("reliance on * * * overt hostility to the enforcement of arbitration agreements would be ill-advised"); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) ("generalized attacks on arbitration [that] rest on suspicion of arbitration" as a means of dispute resolution are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes") (quotation marks and alterations omitted); *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 231-32 (1987) ("it is difficult to reconcile" earlier decisions' "mistrust of the arbitral process with this Court's subsequent decisions involving the [Federal] Arbitration Act").

Third, even if the majority's explicit-reference rule genuinely did apply to such constitutional rights as the right to "worship freely" or the right against involuntary "personal servitude"—rather than being a concocted, post-hoc hypothetical—the majority's protestations of neutrality would still rest on a false equivalence. The majority's fanciful examples describe "rights that an ordinary attorney-in-fact is rarely, if ever, asked to address on the principal's behalf." *Id.* at 97a (Abramson, J., dissenting). By contrast, arbitration agreements "are commonplace." *Ibid.* Thus, as Justice Abramson summarized, "the application of [the explicit-reference] rule will clearly have a disproportionate effect on the ability of agents to enter arbitration agreements (as opposed to other contracts)." *Id.* at 98a. This "disproportionate impact"

is impermissible under the FAA. *Concepcion*, 563 U.S. at 342.[8]

C. Upholding The Decision Below Would Enable States To Impose Numerous Discriminatory Burdens On The Enforcement Of Arbitration Agreements.

If invoking the right to a jury trial or access to a court could provide sufficient grounds to subject arbitration agreements to legal rules not applicable to other contracts, States would be free to discriminate against arbitration in countless ways—even though decades of this Court's precedents hold the exact opposite.

For example, the Montana statute at issue in *Casarotto* declared arbitration agreements unenforceable unless "[n]otice that [the] contract is subject to arbitration" is "typed in underlined capital letters on the first page of the contract" (Mont. Code Ann. § 27-5-114(4)). If the decision below were affirmed, Montana could simply revise that law to replace the word "arbitration" with the term "waiver of

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[8] For the reasons just discussed, every federal district judge in Kentucky that has addressed the question has held that the state-law rule announced by the decision below is wholly irreconcilable with this Court's precedents and therefore preempted by the FAA. See *Preferred Care of Delaware, Inc.* v. *Hopkins*, 2016 WL 3546407, at *2-4 (W.D. Ky. June 23, 2016); *Brandenburg Health Facilities, LP* v. *Mattingly*, 2016 WL 3448733, at *4 & n.3 (W.D. Ky. June 20, 2016); *Pine Tree Villa, LLC* v. *Coulter*, 2016 WL 3030185, at *3 n.1 (W.D. Ky. May 25, 2016); *Owensboro Health Facilities, L.P.* v. *Henderson*, 2016 WL 2853569, at *4 (W.D. Ky. May 13, 2016); *Riney* v. *GGNSC Louisville St. Matthews, LLC*, 2016 WL 2853568, at *3 (W.D. Ky. May 13, 2016); *GGNSC Louisville Hillcreek, LLC* v. *Watkins*, 2016 WL 815295, at *5 n.3 (W.D. Ky. Feb. 29, 2016).

a jury trial" in order to invoke the constitutional right relied upon by the Kentucky court here. Yet that revised statute would be no different than the special notice rule this Court held preempted two decades ago. See 517 U.S. at 683, 687-88.

And endorsing the rationale below would open the door to discriminatory state laws far more burdensome than notice requirements. For example, without ever mentioning the word "arbitration," States could ban predispute waivers of a jury trial or access to a judicial forum—perhaps invoking the theory that a party will not appreciate the importance of such rights until after a dispute has arisen (and knowing full well that a plaintiff who has already brought a lawsuit in court is not likely to agree *ex post* to arbitrate his claims). That would invalidate all predispute arbitration agreements.

Applying the fig leaf of referring to waivers of jury trials or access to courts does not change the substance of such an anti-arbitration rule. "The 'goals and policies' of the FAA * * * are antithetical to threshold limitations placed specifically and solely on arbitration provisions." *Casarotto*, 517 U.S. at 688 (quoting *Southland*, 465 U.S. at 10).

In short, the Kentucky court cannot avoid the preemptive force of the FAA simply by recharacterizing its heightened explicit-reference requirement as one that is not trained on arbitration but instead is targeted towards rights (like the waiver of a jury trial and access to courts) that are fundamental characteristics of arbitration.

II. The FAA Applies To The Question Of Contract Enforceability Presented Here.

Unable to show that the decision below comports with the FAA, respondents at the petition stage argued that the FAA does not apply here at all (see Opp. 16)—a position that even the majority below did not endorse. See Pet. App. 44a-48a (applying the FAA). According to respondents, the FAA applies only to "dispute[s] regarding an arbitration agreement's validity," not to "dispute[s] as to whether an agreement was 'ever concluded.'" Opp. 16 (quoting *Buckeye*, 546 U.S. at 444 n.1).

Respondents' contention is mistaken for multiple reasons. To begin with, there is no contract-formation dispute here: each of the attorneys-in-fact undisputedly entered into a written arbitration agreement on behalf of her principal, and the question is only whether those agreements should be enforced. That question is squarely governed by Section 2 of the FAA. See 9 U.S.C. § 2 (providing that written agreements to arbitrate disputes are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); see also Pet. App. 100a (Noble, J., dissenting) (remarking that the majority's elevation of the jury trial right and explicit reference rule does not "actually affect[] the *formation* of a contract to arbitrate").

In any event, parties cannot circumvent the FAA by attempting to characterize discriminatory state-law rules governing the enforceability of arbitration agreements as rules of contract formation. Indeed, this Court rejected an analogous attempt by the respondents in *Imburgia*, who contended that the FAA was inapplicable because the dispute there involved the "threshold question of whether there's an arbi-

tration agreement in the first place." Tr. of Oral Arg. at 30, *Imburgia*, 2015 WL 6552642, at *30; see also *id.* at *41, 46-47.

This Court squarely rebuffed that attempt to limit the FAA's reach, recognizing that the question before it was whether the California court's "*interpretation* of [the] contract * * * is consistent with the [FAA]." *Imburgia*, 136 S. Ct. at 468 (emphasis added). It should do the same here.

Even if the issue here were genuinely one of contract formation, that would still make no difference. In *Saturn Distribution Corp.* v. *Williams*, 905 F.2d 719 (4th Cir. 1990), for example, the court considered—and squarely rejected—the argument "that the scope of FAA preemption is limited to laws covering existing arbitration agreements, and does not extend to laws that prohibit or regulate the *formation* of arbitration agreements." *Id.* at 723 (emphasis added). Striking down a Virginia law "that prohibit[ed] automobile manufacturers and dealers from entering into agreements that contain mandatory alternative dispute resolution provisions," the *Saturn* court explained that "[t]o restrict the FAA to existing agreements would be to allow states to 'wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts.'" *Id.* at 722, 723 (quotation marks omitted); accord *Sec. Indus. Ass'n* v. *Connolly*, 883 F.2d 1114, 1117 (1st Cir. 1989) (holding that the FAA preempts state regulation restricting securities firms from entering into future arbitration agreements).

These holdings make sound practical sense: If respondents were correct, a State could enact a law expressly forbidding attorneys-in-fact to enter into arbitration agreements under any circumstances, or a

law providing that consumers lack the capacity to enter into arbitration agreements unless they receive prior court approval, and those laws would be immune from federal scrutiny even if they blatantly disfavor arbitration. The FAA's protections cannot be nullified simply by dressing up state-law hostility to arbitration in the garb of "contract formation."[9]

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[9] In a supplemental brief filed at the petition stage, we explained why this case is not affected by a rule promulgated by the Centers for Medicare & Medicaid Services that would prohibit Medicare-participating skilled nursing facilities and Medicaid-participating nursing facilities from entering into new predispute arbitration agreements with residents at their facilities. *First*, that rule applies only prospectively, to contracts entered into after its November 28, 2016 effective date. Pet. Supp. Br. 1. *Second*, the rule's validity is the subject of a pending lawsuit and, in a decision rendered after the filing of the supplemental brief, the district court issued a preliminary injunction barring enforcement of the rule, holding that the plaintiffs had shown a substantial likelihood of success on the merits of their claims that the rule violates the FAA and exceeds the agency's authority. See *Am. Health Care Ass'n* v. *Burwell*, --- F. Supp. 3d ----, 2016 WL 6585295 (N.D. Miss. Nov. 7, 2016).

CONCLUSION

The judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted.

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